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BEFORE THE  
FEDERAL MARITIME COMMISSION

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OFFICE OF THE SECRETARY  
FEDERAL MARITIME COMMISSION

\_\_\_\_\_  
HANJIN SHIPPING CO.,  
LTD.; KAWASAKI KISEN KAISHA  
LTD.; NIPPON YUSEN KAISHA;  
UNITED ARAB SHIPPING COMPANY  
(S.A.G.); and YANG MING MARINE  
TRANSPORT CORPORATION,  
  
Complainants,  
  
v.  
  
THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY,  
  
Respondent.  
\_\_\_\_\_

Docket No. 11-12

STATEMENT OF FACTS NOT IN DISPUTE

Identity of Parties and Jurisdiction

1. Each of the Complainants is an ocean common carrier within the meaning of the Shipping Act, 46 U.S.C. §§ 40102(6) and (17). At all times material to this complaint, each Complainant has operated vessels as an ocean common carrier in the United States foreign commerce subject to the Shipping Act. Ex.1, Declaration of Thomas Aldridge, ¶ 5; Ex. 2A, Declaration of Jesmond Spiteri, ¶ 5; Ex. 2B, Declaration of Captain Louis Ferrer, ¶ 5; Ex. 3, Declaration of Captain T.R. Lee, ¶ 5; Ex. 4, Declaration of Michael Radak, ¶ 5; Ex. 5, Declaration of Seung Bae, ¶ 5

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2. Respondent is a marine terminal operator within the meaning of 46 U.S.C. § 40102(14), FMC Organization No. 002021. *See* [www.fmc.gov/resources/marine\\_terminal\\_operators.aspx](http://www.fmc.gov/resources/marine_terminal_operators.aspx).

**Organization and Use of Facilities at the Port**

3. Respondent leases most of its marine terminal facilities to private terminal operators who operate container terminals located at the Port and who provide marine terminal services and facilities to ocean common carrier vessels calling at the Port. Ex. 6, <http://www.panynj.gov/port/about-port.html>.

4. The Port furnishes none of the services provided to Complainants at those leased terminals. Ex. 1, ¶¶ 7-8, 10; Ex. 2B, ¶¶ 7-8, 10; Ex. 3, ¶¶ 7-8, 10; Ex. 4, ¶¶ 7-8, 10; Ex. 5, ¶¶ 7-8, 10.

5. The Port also maintains and operates public berths. Roll-on/roll-off vessels that transport vehicles transiting the Port dock at the Port's public berths, where private stevedores furnish loading/discharging services. Ex. 1, ¶ 12; Ex. 2A, ¶ 6; Ex. 6, <http://www.panynj.gov/port/about-port.html>.

6. **REDACTED**  
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7. All terminal services (as defined by 46 CFR § 525.1) furnished to Complainants' container vessels within the Port limits are provided by private marine terminal operators at their leased facilities. Ex. 1, ¶¶ 7-8; Ex. 2B ¶¶ 7-8; Ex. 3, ¶¶ 7-8; Ex. 4, ¶¶ 7-8; Ex. 5, ¶¶ 7-8.

8. No services are provided to Complainants' container vessels by the Port Authority. There is no privity or other contractual or commercial relationship between Complainants and Respondents relating to their container vessel services. Ex. 1, ¶¶ 10, 22; Ex. 2B, ¶¶ 10, 21; Ex. 3, ¶¶ 10, 21; Ex. 4, ¶¶ 10, 21; Ex. 5, ¶¶ 10, 21.

9. **REDACTED**

10. In addition to container vessels, Complainants "K" Line and NYK Line also operate non-container vessels, *i.e.*, roll-on roll-off ("ro/ro") vessels for the carriage of vehicles and other wheeled cargo. Ex. 1, ¶ 12; Ex. 2A, ¶ 6.

11. Such ro-ro vessels call at Respondent's public berths. Ex. 1, ¶ 12; Ex. 2A, ¶ 6.

12. At public berths where Complainants' non-container vessels berth, stevedoring is provided by private stevedoring companies; Complainants' vessels do not use services furnished by, or participated in, by the Port in connection with loading, handling or discharging containers or cargo. Ex. 1, ¶¶ 12, 22; Ex. 2A, ¶¶ 6, 13.

### Marine Terminal Tariffs

13. The Port publishes a tariff covering all of its public berths. It is published at <http://www.panynj.gov/port/tariffs.html>. Ex. 10, Port Authority Marine Terminals PAMI FMC No. PA-10, The Port Authority Of New York And New Jersey FMC

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Schedule No. PA 10 Naming Rules and Regulations Applying at Port Authority Marine Terminals and Rates and Charges Applicable For the Use of Public Areas (hereinafter "Tariff"). Ex. 1, ¶ 13; Ex. 2A, ¶ 7; Ex. 2B, ¶ 12; Ex. 3, ¶ 12; Ex. 4, ¶ 12; Ex. 5, ¶ 12.

14. The marine terminal operators who lease and operate the containerized terminals at the Port are: New York Container Terminal, APM Terminals, Maher Terminals, Port Newark Container Terminal, Global Marine Terminal and American Stevedoring Inc. Ex. 11, <http://www.panynj.gov/port/tariffs.html>.

15. The private marine terminal operators which serve Complainants' container vessels publish their own tariffs covering the rates and conditions of their services at their leased facilities. Ex. 11, <http://www.panynj.gov/port/tariffs.html>.

16. Maher Terminal Marine Terminal Schedule No. 010599 is published at <http://www.maherterminals.com/index.cfm/do/page.tariff/>. Ex. 11, <http://www.panynj.gov/port/tariffs.html>.

17. New York Terminal Conference Marine Terminal Schedule No. 011408, applicable at Red Hook Container Terminal, Global Terminal & Container Services, New York Container Terminal, Port Newark Container Terminal and Universal Maritime Service Corp is published at <http://www.newytc.com>. Ex. 11, <http://www.panynj.gov/port/tariffs.html>.

### **Terminal Tariff Provisions Regarding the CFC**

18. Section II of the Tariff, effective March 14, 2011, set forth a Cargo Facility Charge ("CFC") and complete subrules for imposing and enforcing the CFC. Ex. 10, Tariff at Section II of the Tariff, Cargo Facility Charge, Subrule 34-1200, et seq., <http://www.panynj.gov/port/pdf/tariffs-yellow-port-authority-ny-nj-0210.pdf>.

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19. Subrule 34-1200 of Section II of the Port's Tariff defines the CFC, effective March 14, 2011, to apply to "all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths." Ex. 10, Tariff Subrule 34-1200.

20. The Tariff imposes a CFC of \$4.95 per TEU of "Container Cargo," and "any containers larger than forty-feet shall be considered to be the equivalent of two TEUs." Ex. 1, ¶ 14; Ex. 2A, ¶8; Ex. 2B, ¶ 13; Ex. 3, ¶ 13; Ex. 4, ¶ 13; Ex. 5, ¶ 13; Ex. 10, Subrule 34-1210.

21. For Vehicles, the rate is \$1.11 per unit/vehicle; for bulk cargo, break-bulk cargo, general cargo, heavy-lift cargo and other special cargo, it is \$0.13 per metric ton. Ex. 1, ¶ 14; Ex. 2A, ¶8; Ex. 2B, ¶ 13; Ex. 3, ¶ 13; Ex. 4, ¶ 13; Ex. 5, ¶ 13; Ex. 10, Subrule 34-1210.

22. In Subrule 34-1210, the fee is assessed on "container cargo"; however, in Subrule 34-1200, the CTC is made applicable to "all cargo containers." Ex. 10, Subrules 34-1200 and 1210.

23. In practice, Respondent has taken the position that the CTC is charged on all containers, including empty containers (rather than just cargo in loaded containers). Ex. 1, ¶ 15; Ex. 2A, ¶ 9; Ex. 2B, ¶ 14; Ex. 3, ¶ 14; Ex. 4, ¶ 14; Ex. 5, ¶ 14.

24. The Tariff provides for the CFC to be assessed against a so-called terminal "user," defined as "a user of cargo handling services." Ex. 10, Subrule 34-1220(1)(a).

25. The Tariff nowhere defines the term "cargo handling services." Ex. 10.

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26. For the purposes of the CFC, the Port applies “user” to mean any vessel calling at any terminal, including leased terminals, at the Port. Ex. 1, ¶¶ 15-17; Ex. 2A, ¶¶ 9-10; Ex. 2B, ¶¶ 14-16; Ex. 3, ¶¶ 14-16; Ex. 4, ¶¶ 14-16; Ex. 5, ¶¶ 14-16.

27. “Terminal operator” is defined in the Tariff to be a “leased berth operator.” Ex. 10, Subrule 34-1220(1)(b).

28. As a result, under the Tariff as drafted, a vessel must pay the CFC to Respondent if it is a “user of cargo handling services,” even if such services are provided by a party other than Respondent, i.e., a “terminal operator” (leased berth operator). Put another way, Respondent charges vessels for obtaining “cargo handling services,” even though no such services are provided by Respondent. Ex. 1, ¶¶ 10, 13, 22; Ex. 2A, ¶¶ 7, 13; Ex. 2B, ¶¶ 10, 12, 21; Ex. 3, ¶¶ 10, 12, 21; Ex. 4, ¶¶ 10, 12, 21; Ex. 5, ¶¶ 10, 12, 21; Ex. 10, Subrule 34-1220(2)

29. Whether using the services of leased terminals or berthing at public terminals, all vessels are held responsible by the Tariff for payment of the CFC, which charge is triggered by the handling by private entities of all containers and non-containerized cargoes on all carriers’ vessels, including containers operated by vessel space charterers. Ex. 1, ¶¶ 15-18; Ex. 2A, ¶¶ 9-10; Ex. 2B, ¶¶ 14-17; Ex. 3, ¶¶ 14-17; Ex. 4, ¶¶ 14-17; Ex. 5, ¶¶ 14-17; Ex. 10, Subrule 34-1220(2) and (3)(a)(ii).

30. The Port scheme is facially that the lessee terminal operator is required by the Tariff to collect the CFC from each container vessel operator and to forward the payments to the Port. Ex. 10, Subrule 34-1220(2) and (3)(b)(i-ii).

31. In practice, some carriers remit the CFC funds to the Port directly. Ex. 1, ¶ 18; Ex. 3, ¶ 17; Ex. 4, ¶ 17.

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32. Terminal operators must send a monthly Vessel Activity Report ("Report") to the Port detailing all vessel activity at their terminals. The Report must identify vessels from which the terminal operator did not receive the CFC charges stated in Port invoices submitted to the terminal operator. Ex. 10, Subrule 34-1220(3)(a)(ii).

33. For their vessels' use of a public (non-leased) berth, the Tariff directs Complainants to pay the CFC directly to the Port. Ex. 10, Subrule 34-1220(4).

34. The Port issues monthly invoices to each "user" of a leased terminal and to each "user" of a public berth. Ex. 1, ¶ 18; Ex. 2B, ¶ 17; Ex. 3, ¶ 17; Ex. 4, ¶ 17; Ex. 5, ¶ 17; Ex. 10, Subrule 34-1220(3)(b)(i).

35. Invoices to "users" of leased terminals are issued "c/o" the terminal based on the prior month's terminal Report. Ex. 1, ¶ 18; Ex. 2B, ¶ 17; Ex. 3, ¶ 17; Ex. 4, ¶ 17; Ex. 5, ¶ 17.

36. **REDACTED**

37. If a "user" does not pay the CFC charges for two consecutive Report periods, Section II directs the Port to require all terminal operators to cease service to all vessels whose operator did not pay the CFC charge and provides that the Port will issue a port-wide blockade order.

...the Port Authority shall issue a directive to every terminal operator prohibiting them from providing any service that would be subject to a Cargo Facility Charge to the delinquent user for a period from no later than 5 calendar days from the date of the directive until receipt of

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notice from the Port Authority that such unpaid Cargo Facility Charges have been paid.

Ex.1, ¶ 19; Ex. 2A, ¶ 11; Ex. 2B, ¶18; Ex. 3, ¶ 18; Ex. 4, ¶ 18; Ex. 5, ¶ 18; Ex. 10, Subrule 34-1220(3)(b)(iii).

38. The CFC applies to all space charterers on container vessels. Ex. 10, Subrule 34-1220(3)(a)(ii).

39. A directive by the Port to deny service to a delinquent carrier effectively blockades not only that operator's vessels and appurtenant containers, but, as well, all the containers to be carried on the delinquent operator's vessels under space charters, and all the delinquent operator's containers in slots chartered on other operator's vessels. Ex. 1, ¶ 11, 19-21; Ex. 2A, ¶ 11-13; Ex. 2B, ¶ 11, 18-21; Ex. 3, ¶ 11, 18-21; Ex. 4, ¶ 11, 18-21; Ex. 5, ¶ 11, 18-21.

40. If one Complainant signatory to a vessel-sharing agreement were ordered barred by the Port from all Port terminals, other Complainant signatories would be punished. All containers on that Complainant's vessel would be barred, including containers belonging to other Complainants and carried under a space charter or vessel-sharing arrangement. Ex. 1, ¶ 11, 19-21; Ex. 2A, ¶ 11-13; Ex. 2B, ¶ 11, 18-20; Ex. 3, ¶ 11, 18-20; Ex. 4, ¶ 11, 18-20; Ex. 5, ¶ 11, 18-20

41. If a terminal operator continues serving a vessel despite a prohibition of service ordered by the Port, that terminal operator purportedly becomes fully liable to the Port indefinitely for the CFC charges assessed against that vessel, according to the Tariff. Ex. 10, Subrule 34-1220(3)(b)(iv).

42. The threat of berth denial forces Complainants to pay the CFC on both roll-on, roll-out vessel operations and on container vessels/container operations, including



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those of space charterers. Ex. 1, ¶¶ 19-22; Ex. 2A, ¶¶ 11-12; Ex. 2B, ¶ 18-20; Ex. 3, ¶¶ 18-20; Ex. 4, ¶¶ 18-20; Ex. 5, ¶¶ 18-20.

43. Under Subrule 34-1210(5), transshipped containers are subject to the CFC (for one move, not two). “Transshipped containers” mean containers that are discharged from a vessel, placed on the terminal and loaded onto another vessel for further carriage as part of a single voyage; they do not exit the terminal. Ex. 10, Subrule 34-1210(5).

### **Collection of CFC from Complainants**

44. Each of the Complainant’s vessels regularly call at a lessee’s terminal and each Complainant has loaded and discharged, and continues to load and discharge, cargo at the respective terminal. Ex. 1, ¶ 7; Ex. 2B, ¶ 7; Ex. 3, ¶ 7; Ex. 4, ¶ 7; Ex. 5, ¶ 7.

45. According to the process described by the Tariff, since March 14, 2011, each Complainant has been, and continues to be, invoiced by the Port c/o the container terminal operator for the CFC. Ex. 1, ¶¶ 15-18; Ex. 2A, ¶¶ 9-10; Ex. 2B, ¶¶ 14-17; Ex. 3, ¶¶ 14-17; Ex. 4, ¶¶ 14-17; Ex. 5, ¶¶ 14-17.

46. Each Complainant has been, and continues to be, invoiced for the CFC for containers listed in its bills of lading whether carried on its own vessels or on other carriers’ vessels under space charters at all Port terminal facilities. Ex. 1, ¶¶ 15-17; Ex. 2A, ¶¶ 9-10; Ex. 2B, ¶¶ 14-16; Ex. 3, ¶¶ 14-16; Ex. 4, ¶¶ 14-16; Ex. 5, ¶¶ 14-16; Ex. 10, Subrule 34-1220(3)(a)(ii).

47. Each Complainant is forced by the blockade threat to then pay the CFC to the Port via the leased terminal. Ex. 1, ¶¶ 19-21; Ex. 2A, ¶¶ 11-12; Ex. 2B, ¶ 18-20; Ex. 3, ¶¶ 18-20; Ex. 4, ¶¶ 18-20; Ex. 5, ¶¶ 18-20.

### **Threats to Blockade Complainants from Port**

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48. The Port would deny, and the Port has threatened to deny, any Complainant's vessels access to berths at the Port, leased and public, where that Complainant has not paid the CFC according to the Port's demands. The Port announced enforcement for lack of compliance with the CFC and its supporting rules in Section II, beginning August 15, 2011. *See, e.g.*, Ex. 13, Letter, Port to Maher Terminals, Inc., July 18, 2011, PA-CFC00048042.

49. On July 12, 2011, Brian Kobza, Industry Relations - Ocean Carrier, Auto, Rail and Labor at the Port Authority of New York and New Jersey, sent an e-mail to 57 ocean carrier representatives, including Complainants, transmitting a copy of an undated notice from Dennis Lombardi, Deputy Director, Port Commerce Department, to each Leased Berth Terminal Owner. Ex. 14, PA-CFC00048013.

50. The notice from Mr. Lombardi, transmitted to the carriers by Mr. Kobza, stated that the first enforcement action for uncollected Cargo Facility Charge amounts will be taken on August 15, 2011. Ex. 15, PA-CFC00048014.

51. The notice further stated:

Within 30 days after the date of each invoice, the lease berth operator must remit the amount collected from each user and/or make a report of each user who failed to pay the Cargo Facility Charge during the relevant Vessel Activity Reporting period. In the event of a failure by a user to pay Cargo Facility Charges for two consecutive Vessel Activity Reporting periods, the Port Authority will issue a directive to all leased berth operators prohibiting them from providing any service that incurs a Cargo Facility Charge to the delinquent user. Should a Terminal Operator provide service to a user in violation of the directive, such Terminal Operator shall be liable for, and shall pay to, the Port Authority the full amount of the Cargo Facility Charges resulting from services performed by that Terminal Operator for the affected user on or after the date of the violation of the directive.

Ex. 15, PA-CFC00048014

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52. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

53. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

54. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Inapplicability of Respondent's Tariff to Private MTO facilities

55. The lessee MTOs that serve Complainants' container vessels assess charges in accordance with their published tariffs, or in accordance with rates specified in individual

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contracts with Complainants. Ex. 1, ¶ 9; Ex. 2B, ¶ 9; Ex. 3, ¶ 9; Ex. 4, ¶ 9; Ex. 5, ¶ 9. The Complainants' vessels pay fees and charges to the lessee MTOs for actual services performed at their leased container facilities, pursuant to their tariffs or Complainants' contracts with them. Ex. 1, ¶ 22; Ex. 2A, ¶ 13; Ex. 2B, ¶ 21; Ex. 3, ¶ 21; Ex. 4, ¶ 21; Ex. 5, ¶ 21.

56. The CFC is a surcharge by the Respondent against each Complainant for using services at the private MTO facilities. The vessels, therefore, are subjected to additional (and duplicative) charges for their use of private MTO services. Ex. 1, ¶¶ 9-10, 15, 22; Ex. 2A, ¶ 13; Ex. 2B, ¶¶ 9-10, 14, 21; Ex. 3, ¶¶ 9-10, 14, 21; Ex. 4, ¶¶ 9-10, 14, 21; Ex. 5, ¶¶ 9-10, 14, 21.

57. The Port's Tariff refers to "user" or "Port User" throughout the Tariff, approximately twenty-four (24) times, in reference to use of Port facilities; however, the Tariff provides, for the first time, a definition of "Port User" in Section H, the CFC section, "'User' shall mean a user of cargo handling services." Ex. 10, Subrule 34-1220(1)(a).

58. Before the adoption of the CFC in Section II, Respondent's Tariff never before defined "user" to encompass parties not using the Port's services. Ex. 10.

59. While the lessee MTOs' dealings with Respondent are controlled by the terms and conditions extant in their MTO lease Tariff, Section H, Subrule 34-1220s with the Port, the private MTO's terminals are expressly exempt from the Respondent's Tariff rules and regulations. Ex. 10, Subrule 34-090.

60. Tariff Subrule 34-090 states

Any permission granted by the Port Authority directly or indirectly, expressly or by implication, to any person or persons to enter upon or

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use a terminal or any part thereof (including) watercraft operators, crew members and passengers, spectators, sightseers, pleasure and commercial vehicles, officers and employees of lessees and other persons occupying space at such terminal, persons doing business with the Port Authority, its lessees, sublessees and permittees, and all other persons whatsoever whether or not of the type indicated, is conditioned upon compliance with the Port Authority Rules and Regulations; and entry upon or into a terminal by any person shall be deemed to constitute an agreement by such person to comply with said Rules and Regulations; provided, however, that unless provision is made in the lease for application of said Rules and Regulations to the leased premises, such Rules and Regulations shall not apply to such leased premises. (Emphasis supplied.)

Ex. 10, Subrule 34-090.

61. Complainant's private terminal operators in the port have not made provision in their leases for the Port's Tariff Rules and Regulations to apply. *See* FMC Agreement No. 201131 PANYNJ/Maher Lease, [http://www2.fmc.gov/agreements.mtos\\_npage.aspx](http://www2.fmc.gov/agreements.mtos_npage.aspx)

62. [REDACTED]

### Background and Adoption of the CFC

63. [REDACTED]

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64. [REDACTED]

[REDACTED]

[REDACTED]

65. [REDACTED]

[REDACTED]

[REDACTED]

66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

67. [REDACTED]

[REDACTED]

68. This marketing plan was finalized (undated) with supporting data. Ex. 25, PA-CFC00011063-69.

69. [REDACTED]

[REDACTED]

[REDACTED]

70. [REDACTED]

[REDACTED]

71. [REDACTED]

[REDACTED]

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72. [REDACTED]

[REDACTED]

[REDACTED]

73. [REDACTED]

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74. [REDACTED]

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75. [REDACTED]

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76. [REDACTED]

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77. [REDACTED]

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78. [REDACTED]

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79. [REDACTED]

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80. [REDACTED]

[REDACTED]

[REDACTED]

81. [REDACTED]

[REDACTED]

[REDACTED]

82. New Jersey Senator Joseph Pennacchio has introduced a bill requiring a CFC-like charge levied on cargo only. Ex. 32, Senate, No. 2325, State of New Jersey 215<sup>th</sup> Legislature.

83. [REDACTED]

[REDACTED]



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89. REDACTED

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90. The Port adopted the CFC in 2010 as a so-called “cargo-based” charge to be imposed on Complainants and other carriers. The Port supported its adoption, stating the goal of the CFC assessment on “cargoes,” not vessels. Ex. 37, Port’s Board Meeting Minutes.

91. More recently, the Port confirmed that carrier CFC payments are not earmarked for particular expenditures. In a document request for “all documents sufficient to show Respondent’s expenditures of CFC receipts,” Respondents objected that “because CFC receipts are not earmarked for particular expenditures . . . the requested documents do not exist.” Ex. 38, Respondent’s Objections and Responses to Complainants’ First Request for Production of Documents, Response to Request No. 52.